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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Tunisia

-- Session II --

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OBSTACLES ENCOUNTERED BY THE TUNISIAN COMPETITION COUNCIL IN FULFILLING ITS MISSION¹

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1. Until the mid-1980s, the Tunisian economy was based on the centrally planned model in which an omnipresent State assumed:

- Direct responsibility for strategic economic sectors (petroleum products, iron and steel, transport, energy, etc.).
- Control over essential products through its marketing offices (oil, sugar, cereals).
- Control over prices by setting prices for essential products and by specifying profit margins for other products.

2. Through a system of prior approval and authorisation, the State controlled private investment (sectors of activity and geographical location), regulated the distributive trades (wholesale and retail), and limited imports.

3. After demonstrating its limitations, this model proved to be incapable of driving the economy to a higher level or of improving the living conditions of the population.

4. For these reasons, from 1986 onwards Tunisia committed itself to a programme of liberalisation and structural adjustment aimed at gradually introducing market economy mechanisms, liberalising domestic and foreign trade and encouraging private initiative, with a view to creating a free-trade zone with the European Union by the year 2007.

5. This new policy sought to create a genuinely competitive environment, which had been non-existent prior to 1986, and to overcome the handicaps created by the monopolies and oligopolies that emerged from the economic dirigisme pursued during the 1970s and 1980s.

6. To achieve this, the Tunisian State has put in place new instruments³ and introduced a number of measures that should allow it strike the necessary balance between freedom and economic public order⁴.

7. This new policy based on the market economy necessarily involved the creation of a body responsible for monitoring compliance with the rules of competition and for combating anticompetitive practices.

8. The creation of the Competition Council was accompanied by the introduction of the first core of Tunisian competition law, which drew heavily on French and European law. When faced with certain problems inherent in Tunisia's socio-economic environment, however, the Competition Council has not hesitated to adapt the provisions of this legislation to meet the requirements of an economy in transition.

1. The need to adjust competition law to the socio-economic environment of the country

9. Law No. 91-64 on competition and prices consists in a set of general rules that are largely based on European law and that leave the competition authority with a great deal of leeway in their interpretation. However, since the application of competition law goes hand in glove with development policy, the

Competition Council is called upon to take account of the transitional period in which the Tunisian economy currently finds itself and which justifies a gradual and flexible adoption of competition rules, as well as respect for the socio-economic imperatives of the country.

1.1 Rules already in place

10. The withdrawal of the State from the economy is not always replaced by economic forces capable of taking over the economic activities the State abandons or chooses to transfer to the private sector.

11. Under these conditions, unless the requisite precautions are taken beforehand, the sudden opening of the local market and swift adoption of the entire corpus of competition rules can pose a genuine threat to as yet still fragile economies.

12. Consequently, while reiterating the principles and rules of competition law that have been enshrined and generally accepted by the main international bodies, Tunisian legislation provides for a number of derogations relating to the particularities of the economic situation in Tunisia, and also to socio-political considerations that require an incremental and flexible approach to the adoption of the competition rules. The most significant example is the ban on exclusive distribution contracts and franchises, except in cases where they represent a technical or economic advance offering a fair share of the profits to users.

13. Similarly, Article 2 of the Tunisian Competition Act establishes the principle of free competition by stating that "the prices of goods, products and services shall be determined by the free play of competition". However, Article 3 of the same Act adds that "the free price regime set out in the foregoing Article 2 shall not apply to goods classified as essential or relating to sectors or areas where price competition is limited either because of a monopoly or long-standing procurement problems, on the one hand, or because of legislative or regulatory requirements on the other. The list of such goods, products and services, as well as the conditions and procedures for setting their purchase and retail prices, shall be published by decree."

14. Drawing on these provisions, the Tunisian Competition Council has affirmed on several occasions its adherence to the principle that competition is not an end in itself and that it is limited by the demands of technical, economic or social progress, and by consumer interests which are the ultimate goal of any economic policy (Opinion No. 2267 of 12 December 2002).

15. It should be noted that Tunisian competition legislation has been amended on a number of occasions and on average every three years, the latest amendment being in November 2003 to adjust to economic developments in the country and to honour numerous international commitments entered into by the Tunisian State.

16. While it is largely acknowledged, in the light of these various provisions, that competition between enterprises is a basic factor in economic efficiency, between non-competition and total and absolute competition a choice nonetheless needs to be made between a number of levels that are appropriate to the needs of the country and commensurate with the stage reached in its development. It is therefore the task of the Competition Council to ensure that an appropriate match is made.

1.2 Implementation in practice

17. In an opinion issued on 10 January 2002⁵, relating to a draft Law on livestock rearing and animal products, the Competition Council considered that the profusion of overlapping legislative texts created inequalities between enterprises in terms of access to information, that the number of bodies responsible

for implementing those texts restricted the transparency of transactions and was an indirect obstacle to freedom of competition, and that the latter was not an end in itself but a means of achieving economic efficiency and satisfying consumers.

18. This opinion also enshrined the principle that social objectives can justify economic exceptions to competition⁶, and that it is perfectly feasible to meet health and public security imperatives without necessary infringing on the rules of free competition⁷. The Competition Council has repeatedly stated that the rules of competition do not conflict with the principles of public service. Nonetheless, the gradual implementation of competition rules entails guaranteeing market access to private operators, which will require a clear distinction to be drawn between the administration as a public authority and the administration as an economic operator, and a separation of the respective functions of administrative management, supply of services and control and regulation.

19. However, the application of competition rules must not have the result of placing public enterprises operating in the market in a less favourable position compared to private operators, which would mean making all operators, both public and private, subject to the requirement to respect the principle of continuity of public service, as well as the principle of equality whereby all users enjoy the same rights⁸.

20. By the same token, when the administration exercises its administrative functions, it must refrain from creating a situation in which a given enterprise can abuse a dominant market position⁹, even though consolidating the competitiveness of national enterprises in relation to international competition is one of the elements to be taken into consideration when reviewing requests for the authorisation of concentration operations¹⁰.

21. In its litigation activity, in particular Case No. 2/2001 of 19 December 2002, the Competition Council considered that public legal persons, whenever they pursue an economic activity, are subject to the rules of competition in the same way as private legal persons. It even found a professional organisation to be guilty of anticompetitive practices once it had been proved that the organisation had colluded in illegal price-fixing between enterprises¹¹.

2. The credibility of the Competition Council depends upon its own actions

22. In most transition economies, besides the lack of material, financial and human resources, it is primarily the lack of a competition culture and even, in some cases, the ambiguity and gaps in the legal texts relating to competition, compounded by a lack of documentation and economic data, which create obstacles.

23. The Competition Council has availed itself of all the instruments at its disposal to fulfil, to the best of its ability, the task it has been assigned of regulating the market and providing an essential support for development policy. Obstacles of a legislative, material or human nature have not prevented it from undertaking all actions possible to establish itself as the guardian of the free competition on which economic efficiency depends.

2.1 *Expanding its sphere of action to fulfil its mission*

24. The Competition Council's Annual Report for 2001 shows that the first ten years of operation revealed the limits to the Council's litigation functions, a direct outcome of the ignorance of economic actors regarding the precise role and prerogatives of this institution.

25. In view of this, the Competition Council took the initiative to make itself better known to all actors on the economic scene. Three target audiences were selected: economic actors, academics and

experts in the field, and the general public. The aim in particular was to make use of the media – radio, television and the written press – by answering all their requests for information, and to seize every opportunity, such as amendment of the legislation or presentation of the Annual Report to the President of the Republic, to explain the remit of the Council and demonstrate its effectiveness.

26. To reach out to the academic world, the Council decided to organise seminars and symposia in universities, schools and specialised institutes, to support research carried out by academics and doctoral students, and to organise Round Tables hosted by the Council or organised in the regions, in collaboration with Chambers of Commerce and Industry, to which economic operators, professional and sectoral or consumer protection organisations, lawyers, judges and business advisors would be invited.

27. In addition, the latest judgements handed down by the Council have included an injunction compelling the party losing a case to publish the Council's judgement, at his own expense, in two national newspapers¹².

28. This sustained drive has led to an increase in the number of cases judged which, in comparison with 2001, doubled in 2002 and tripled in 2003.

2.2 *Using procedure to extend its scope of action*

29. The Competition Council does not have the right to instigate its own proceedings for infringements of competition rules. Proceedings may only be initiated by the Minister responsible for Trade, enterprises, professional or trade union organisations, consumer protection organisations and chambers of commerce and industry. Nevertheless, the Council can instigate proceedings in cases where one of the parties has withdrawn and where the investigations in a case brought before it reveals anticompetitive practices in a related market.

30. In order to overcome this problem, the Competition Council has established the jurisprudential principle whereby a case brought before the Council is held to apply to the market as a whole. As a result, the Council is bound neither by the petitions or means of claimants, nor by the parties named in the petition. It can therefore extend a case to other facts or persons, and can also restate the facts¹³.

2.3 *Asserting full jurisdictional competence as the guardian of free competition*

31. At a time when economic activity is developing and diversifying at an extremely rapid pace, and anticompetitive practices are assuming new forms and aspects often not foreseen in the legislation, the Competition Council must play an increasingly active, dynamic and pioneering role in order to justify its status as the champion of competition in all its guises.

32. The Council assumes this role through its advisory function, which allows it to stay ahead of developments, and also through its litigation function.

33. Although the Tunisian Competition Act does not specify whether or not it applies to public persons, the Council has enshrined the principle that they are indeed subject to competition law every time they exercise an economic activity in the production, distribution or service sectors. Nevertheless, unilateral acts arising from the exercise by the administration of the prerogatives of public power remain within the jurisdiction of the administrative judge responsible for ruling on action *ultra vires*¹⁴.

34. In addition, the Council had an opportunity in 2002 to dispel the confusion that existed in the minds of claimants regarding the difference between anticompetitive practices and unfair competition¹⁵, which had led to a very large number of cases being brought before the Council over which the latter had no jurisdiction.

35. Moreover, the Council's jurisprudence played a pioneering role in ruling that offenders who collaborate with investigators, or who provide the Council with determining documents or evidence, can be partially or totally exempted from fines¹⁶. This jurisprudence was recently enshrined in law¹⁷, although the lack of any intention to hinder free competition does not constitute grounds for exempting from sanction the enterprise found guilty¹⁸.

36. The Competition Council, when faced with certain gaps in the legislation, has used its innovatory role to safeguard the freedom of competition in the market. Faced with the narrowness of the definition of dumping, for example, the Council was prompted to draw on comparative law from which it adopted the concept of abusively low pricing, which allowed it to combat certain practices by a public enterprise during the production stage¹⁹ and to suggest to the Minister responsible for Trade that he should make similar use of this new concept²⁰ to prosecute certain practices observed in the hotel industry in view of the fact that, under Tunisian law, the concept of resale at a loss could not be applied to services.

37. In conclusion, the Competition Council will undoubtedly have to face a number of challenges in the future, one of which being the development of certain cross-border practices, which may pose a threat to competition and which, because of that, make it essential to seek a multilateral framework for co-operation.

NOTES

1. The opinions expressed in this paper are those of the author alone and do not in any way reflect the views of the Tunisian government.
2. Gharzi Jeribi is Chairman of the Tunisian Competition Council.
3. A vast enterprise aid programme has been put in place to help firms improve their performance at all levels. This programme is aimed above all at bringing firms up to the requisite level and its main components are a competitiveness development fund, an export promotion fund and a vocational training and employment fund.
4. These reforms have mainly addressed the following areas:
 - Liberalisation of investment within the framework of the 1993 investment code. The system of prior approval was replaced by a system of fiscal incentives in favour of certain priority sectors and economically disadvantaged regions;
 - Progressive liberalisation from 1994 onwards of approximately 80% of imports of foreign goods;
 - Gradual dismantling of tariffs through the steady lowering of customs duties on imported goods;
 - Liberalisation of the distributive trades in 1991 and replacement of administrative authorisation by compliance with specifications;
 - Adoption of free pricing in 1991, except for a list of essential products and in certain economic sectors experiencing severe dysfunctions or disturbance;
 - Refocusing the activities of the General Compensation Fund to limit its scope of intervention to essential products consumed by the most disadvantaged social categories and elimination of the priority given to Tunisian firms in the award of public contracts;
 - Gradual privatisation of public enterprises.
5. Opinion No. 13/2001 of 10 January 2002.
6. Opinion No. 2259 of 7 March 2002 on meal tickets.
7. Opinion No. 2264 of 16 May 2002 on draft legislation relating to the fertiliser sector.
8. Opinion No. 2268 of 21 November 2002 on draft legislation regarding the organisation of inland transport.
9. Opinion No. 2262 of 25 April 2002 on a call for bids relating to a franchise operation.
10. Opinion No. 2266 of 24 September regarding an economic concentration operation – concentration operations are subject to approval from the Minister responsible for trade in accordance with certain conditions and subject to an optional opinion by the Competition Council. However, the decision to approve or withhold the authorisation is an administrative act that can be appealed against in the courts on the grounds of action *ultra vires*.
11. Case No. 2137 of 27 March 2003.

12. Although the Act does not provide for this action specifically, the Competition Council has used it in a number of cases and notably Case No. 2136 of 17 July 2003.
13. Case No. 2001/1 of 6 November 2002 and Case No. 2136 of 17 July 2003.
14. Case No. 2001/2 of 19 December 2002.
15. Case No. 9/93 of 25 September 2002 and Case No. 2143 of 25 October 2003.
16. Case No. 2136 of 17 July 2003.
17. Law No. 74/2003 of 11 November 2003 (Article 19).
18. Case No. 1/2000 of 6 November 2002.
19. Previous Case (1/2000).
20. Opinion No. 3282 of 17 July 2003.